IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1173 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BACHUBHAI VALABHAI VANKAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1173 of 1994

MR YOGESH S LAKHANI for Petitioner

MR HL JANI, APP for Respondent

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 05/06/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

This appeal, under Section 374 of the Code of

Criminal Procedure, 1973, is directed against the judgement and order dated 29.10.1994 passed by the learned Additional Sessions Judge, Rajkot in Sessions Case No. 85 of 1989 convicting the appellant-accused for the offence punishable under Section 302 IPC and sentencing him to imprisonment for life and fine of Rs.2,000/- in default rigorous imprisonment for six months.

2. The accused was charged with the offence of committing murder of his daughter Maniben Bachubhai ("the deceased" for short), aged 18 years, by pouring kerosene on her and thereafter setting her on fire. The charge was that the accused had done so with the intention of causing death of the deceased or had done so with the intention of causing injury which would be sufficient in the ordinary course of nature to cause death of the deceased. The prosecution case was that the accused and his wife had six daughters and two sons. The eldest daughter was already married. Deceased Vasni alias Maniben was the second daughter, aged 18 years and the third daughter Manjuben was already betrothed. The wife of the accused and their daughters were picking up rags and maintaining family from the income generated by this activity, as the accused was spending his income from the rental of an auto-rickshaw for consuming liquor. On 1.4.1989, the wife of the accused and Manjuben had gone to a relative's place where the prospective in laws of Manjuben had also gone. This was at about 10 O' clock in the morning. The accused and the deceased were at their residence when the accused demanded money from the deceased for buying liquor, since the deceased had no money, she declined. Thereupon the accused insisted that the deceased should get money from anywhere. Hence, the deceased went to the house of her grand-mother Jethiben and told her that the accused (i.e. the father of the deceased) was demanding money for buying liquor, but the grand-mother also refused to give any money. Hence, the deceased came back home without any money. On not getting any money from the deceased, the accused started beating up the deceased and told her that if the grand-mother could not give her any money, she (the deceased) should sell her body and get the money. On hearing this, the deceased stated that instead of uttering such words, the accused should rather kill the deceased. Thereafter the accused tied the hands of the deceased with the sari that she was wearing and gagged her mouth with a piece of cloth and poured kerosene on her body and lighted a match stick and set her on fire. Once the deceased caught flames, the accused threw a mattress on her body and ran away.

3. At the trial, the prosecution examined PW 5 grand-mother of the deceased (Jethiben Nathubhai) at Exh. 44, who was also the mother-in-law of the accused, PW 6 Manjuben Bachubhai-sister of the deceased at Exh. 45 who was also the third daughter of the accused, PW 13 Rajiben Meghjibhai, wife of the accused and the mother of the deceased at Exh. 56 as well as PW 8 Aminaben Abubhai at Exh. 49 and PW 9 Jamnaben Nanjibhai at Exh. 50, who are neighbours of the accused and the deceased. The prosecution also examined PW 7 Khimjibhai Ujariya at Exh. 46, who was the Executive Magistrate, who recorded the dying declaration and PW 14 Dr Rajendra Shantilal Pandya at Exh. 58 in whose presence the dying declaration was recorded by the Executive Magistrate. The prosecution also examined Investigating Officer-Shaktisinh Jhala at Exh. 75 and other witnesses including PW 16 Mastram, police constable who was at the hospital police chowky at Exh. 62. The prosecution also relied on the dying declaration at Exh. 48, the complaint at Exh. 76 and the other documents produced on record. The defence did not lead any evidence.

4. While Jethiben Nathubhai (mother-in-law of the accused) and Rajiben Meghjibhai (wife of the accused) did not support the prosecution case, Manjuben Bachubhai (the third daughter of the accused and sister of the deceased) (Exh.45) as well as neighbour Aminaben (Exh. 49) supported the prosecution. The complaint and the original dying declaration were also duly proved. The defence case was that the deceased had sustained accidental burn injuries on account of primus stove falling on the deceased as stated in the entry made at 12.05 in the hospital police chowky entry register. In reply to the questions put to him u/s 313 Cr.PC., the accused took the stand of total denial and submitted a further statement in writing on 3.9.1994 imputing motives to neighbour Aminaben and daughter Manjuben for falsely roping in the accused; that Aminaben used to have frequent disputes with the accused regarding goats and was, therefore, bent upon getting the accused convicted and for getting him jailed for life imprisonment. As regards his daughter Manjuben, the accused alleged that the accused did not allow her to marry a boy of her choice, but got her married to a person with status in the community, but she was quarrelling as she did not want to get married there. Hence, she had turned vindictive for getting the accused imprisoned.

5. After hearing the arguments of the learned Public Prosecutor and the learned advocate for the accused and

after considering the evidence on record, the learned Additional Sessions Judge gave the finding that the deceased had not sustained any accidental burn injuries, but the accused was enraged by the deceased not giving him any money for buying liquor and he had tied the hands of the deceased, gagged her month, poured kerosene on her body and set her on fire with a match stick with the intention of causing death of his own daughter Maniben. The learned Judge held that the oral dying declaration made by the deceased before neighbour Aminaben immediately after the incident and her dying declaration recorded by the Executive Magistrate in presence of the Medical Officer as well as the complaint recorded by the Investigating Officer after the said dying declaration as well as the evidence found at the scene of offence were sufficient to show beyond reasonable doubt that the accused had committed the murder of the deceased. After recording conviction, the learned Judge heard both the sides on the question of sentence and passed the order for sentencing the accused to life imprisonment with a further sentence of fine of Rs.2,000/- in default rigorous imprisonment for six months. It is the aforesaid judgment and order which is under challenge in this appeal.

6. Mr Yogesh Lakhani, learned counsel for the appellant-accused has made the following submissions for assailing the order of conviction :-

(i) Entry No. 1 (Exh. 63) made by the constable at 12.05 on the date of the incident immediately after the injured person (who subsequently succumbed to the injuries) was admitted to the hospital was the first information in point of time and as per the said entry the burn injuries were sustained on account of the primus stove with wicks turning upside down and the clothes of the deceased catching flames. This entry was also corroborated by the corresponding entry Exh. 60 made in the entry register of the Rajkot Police Station diary. This being the first and the earliest available evidence, must carry greater weight than any other subsequent evidence and is sufficient to acquit the accused of the charge levelled against him.

(ii) Aforesaid entry No. 1 was made by constable Mastram after speaking to the deceased who was at that time alive and, therefore, this was the first dying declaration made by the injured. When the prosecution has not led any evidence or

offered any explanation for not accepting the said entry, the contents thereof disprove the entire prosecution theory of homicidal death and is only consistent with the defence case of accidental burn injuries.

(iii) The prosecution has relied on the dying declaration of the injured which was allegedly given by the injured when she had suffered almost 100% burn injuries all over her face and neck. It is, therefore, not possible to believe that the injured could have given any such dying declaration with such serious burn injuries.

(iv) The so-called dying declaration recorded by the Executive Magistrate does not state in so many words that the accused had set the deceased on fire. The FIR recorded thereafter gives much greater details about the alleged incident. There is no reason why such details given in the FRI were not given when the Executive Magistrate was recording the dying declaration just a few minutes before recording of the FIR. In the dying declaration recorded by the Executive Magistrate, the deceased has referred to the demand of Rs.25/- made by the accused for buying liquor, but no such amount is mentioned in the FIR.

(v) Aminaben's presence at the scene of offence and the oral dying declaration made by the deceased before Aminaben is not believable. If Aminaben had gone to the house of the deceased immediately after the incident, she would have also accompanied the deceased to the hospital as the deceased was still alive when she was rushed to the hospital. Aminaben had a grudge against the accused as narrated in further statement of the accused in writing.

(vi) Manjuben was on inimical terms with the accused viz. her father because he was consuming alcohol and demanding money from Rajiben i.e. the wife of the accused and the mother of Maniben and her five sisters and two bothers. Hence, Manjuben was bent upon seeing that the accused goes to jail even for the accidental burn injuries suffered by her elder sister Maniben.

(vii) According to the Investigating Officer, he had received information from Head Constable

Nathabhai, who was entrusted with the investigation, about the accused having poured kerosene and set the deceased on fire and, therefore, the PSI going to the hospital for investigation, but Nathabhai has not been examined. So the source of information from whom Nathabhai came to know about the aforesaid cause has remained unexamined and unexplained.

7. On the other hand, Mr HL Jani, learned Additional Public Prosecutor for the State has supported the judgment and order of the learned Additional Sessions Judge and has further submitted that no daughter would like to falsely rope in her father. It is also submitted that the prosecution has adduced a number of complaints showing that the accused was in the habit of consuming liquor and that it was because he did not get money from his second daughter-deceased who was at the residence on that day that he went to the extent of taunting her to sell her body to give him money for buying liquor and when the deceased reacted as any daughter in her place would do, the accused tied her hands, poured kerosene on her and set her on fire. Mr Jani has further stated that the incident took place on 1.4.1989 and the dying declaration as well as the complaint were recorded on the same day, but the accused could be arrested on 14.4.1989. It is, therefore, submitted by Mr Jani that the conduct of the accused in not only running away from the scene of offence as seen by the neighbours including Bai Aminaben, but also in absconding for as long as two weeks speaks volumes for the mens rea of the accused who realized the gravity of the offence and, therefore, evaded the arrest for two weeks.

Mr Jani has further submitted that the presence of Aminaben was quite natural as she was a neighbour and upon finding that the deceased was in flames, she had naturally gone to the neighbour's house to save the deceased. When she found that the deceased was gagged with the piece of cloth, she had removed it and then she also pointed out that piece of cloth to the panch witnesses which cloth was recovered when the panchnama was made at about 4.15 on the same day.

8. Having heard the learned counsel for the appellant-accused and the learned Additional Public Prosecutor, we are not in a position to find any fault with the order of conviction recorded by the learned Sessions Judge.

9. The incident took place between 11.00 and 11.45

AM on 1.4.1989. The injured who sustained severe burn injuries was rushed to the hospital immediately. Before the dying declaration was recorded at 3.30 PM, the Medical Officer of the Hospital made the following endorsement -

"Patient Maniben is fully conscious and well physically to give D.D.

Sd/-
15-30
1.4.1989"

and the following endorsement was made at the conclusion of the dying declaration :-

"Patient Maniben normal, fully conscious during D.D.
Sd/-
15.40
1.4.1989"

The Executive Magistrate recorded the dying declaration of the injured in the question-answer form. The deceased gave her own name, the name of her father, her age, the fact that she was not married and her complete address. The answers to all these questions clearly indicate that the injured was fully conscious and was in a position to understand the questions put to her and her answers. When she was specifically asked as to how she sustained burn injuries, she stated that kerosene was poured on her. In a further specific question as to who poured kerosene, the injured stated that her father had poured kerosene on her; that he was in the habit of consuming liquor and he had demanded Rs.25/-; since she did not give money, he had poured kerosene on her.

Much has been sought to be made out by the learned counsel for the appellant-accused that the injured did not state anything further that the accused had set her on fire. However, it is required to be appreciated that the Executive Magistrate has clearly stated in his evidence before the Court that he had told the injured that she should give answers to the questions being put to her and accordingly he put questions to her and recorded her answers. It is true that the Executive Magistrate could have put more detailed questions to the injured, but it is also required to be noted that the deceased had sustained almost 100% burn injuries and, therefore, even after noting that the deceased was fully conscious, the Executive Magistrate seemed to be aware

that he was not to grill the injured who was already undergoing the trauma of such severe burn injuries. The injured or anybody else had not given any indication that the person pouring kerosene on the body of the injured and the person lighting the match stick were two different persons. Hence, in the ordinary and natural course of events, an inference can be drawn that the person pouring kerosene on the body of the another person would himself light a match stick and set that person on fire. Moreover, it is also required to be appreciated that the dying declaration recorded by the Executing Magistrate in presence of the doctor is not the only piece of evidence against the accused nor has the learned Judge passed the order of conviction merely relying on the said dying declaration. Apart from the complaint which immediately followed recording of the dying declaration, (the complaint was recorded at 3.45 PM) Bai Aminaben, the neighbour of the deceased has also clearly stated in her evidence (Exh. 49) that when she was returning home at about quarter to twelve in the morning, she had seen smoke coming out of the house of the accused and she had entered the house and removed the mattress which was lying on Maniben, daughter of the accused. Maniben was also found to be gagged with a piece of cloth and Aminaben removed the piece of cloth and inquired from her as to what had happened and Maniben replied that her father had poured kerosene on her and set her on fire and that this was done because Maniben did not give any money to the accused for buying liquor. She also identified the mattress and gags which were shown to her. Aminaben had been the neighbour of the accused and the deceased for the last 17 to 18 years. Therefore, it was quite natural on her part to enter the house of the accused and the deceased, when she found the smoke coming out from the neighbour's house. There is no reason why Aminaben would falsely depose against the accused. The case that the accused put in his further statement dated 4.9.1994 that the accused and Aminaben had disputes about goats was never suggested to Aminaben in her cross examination which took place on 18.8.1994. Hence, the defence of so called enmity between Aminaben and the accused was clearly an after thought.

10. Similarly Manjuben, the third daughter of the accused was examined at Exh. 45 on 18.8.1994 and she had also clearly stated that the family was being maintained from the income of the six sisters and their mother whereas the accused used to consume liquor and beat up the family members and demand money from the mother and daughters for buying liquor. Manjuben also stated that when she reached the residence on the date of the

incident, the neighbours told her that her sister Maniben was burnt by the father. There is no reason why Manjuben, daughter of the accused, would falsely implicate her own father. The defence put up by the accused in his further statement dated 4.9.1994 that Manjuben wanted to marry some other boy and not the one to whom she was betrothed was not suggested in the cross examination of Manjuben which took place on 18.8.1994 but the only suggestion made to Manjuben was that the accused was not consuming liquor and that it was not true that he was not giving money for the family members. In fact, the nine complaints on record at Exhs. 65 to 74 clearly show that the accused was in the habit of consuming liquor and nine cases were registered against him. Nothing was brought out in the cross examination of Aminaben or Manjuben to shake their credibility or to indicate any reason why the two ladies who were none other than the daughter of the accused and immediate neighbour of the accused for the last 18 years would tell a lie to falsely implicate the accused in the serious offence of murder by the accused of his another own daughter Maniben.

11. It is in light of the aforesaid evidence on record that we have to consider the submission on behalf of the appellant-accused that entry No. 1 made by constable Mastram in the hospital chowky entry register at 12.05 on the date of the incident destroys the entire prosecution case about homicidal death. It is true that the said entry refers to burn injuries to the injured by a primus stove with wicks, turning upside down and the clothes of the deceased catching flames. Though constable Mastram stated in his cross examination that the said entry was made by him after speaking to the patient, the entry itself does not give any indication that the information in question was received from the patient herself. The entry refers to Bhanuben Ramjibhai who had brought the injured to the hospital. Moreover, there is nothing on record to show that Maniben who had sustained almost 100% burn injuries between 11.00 and 11.45 AM and who was rushed to the hospital at about 12.00 Noon was conscious to make any such statement before constable Mastram when she was admitted to the hospital. In the ordinary course of nature, one can proceed on the basis that a person who had received such severe burn injuries would not be able to come out of the trauma of such serious burn injuries immediately. Although Dr Rajendra Shantilal Pandya, Medical Officer of the hospital was examined by the prosecution for showing that the injured was fully conscious when her dying declaration was recorded by the Executive Magistrate

between 3.30 and 3.40 PM, the defence did not put any question to the said Medical Officer about the physical and mental condition of the injured at the time of her admission to the hospital at 12.00 Noon. When the accused was relying on entry (Exh. 63), it was for the accused to show that when the said entry was made, the injured, who subsequently succumbed to almost 100% burn injuries, was conscious and was in a state of mind to disclose any information about the cause of the burn injuries at that point of time when even one hour was not over from the time when the injured sustained severe burn injuries.

12. As regards the alleged discrepancies between the dying declaration recorded by the Executive Magistrate and the complaint recorded by the Investigating Officer, we find no substance in the said submission. As already indicated earlier, the Executive Magistrate had recorded the dying declaration in the question-answer form and had clearly asked the injured only to give answers to the questions being put to her. Hence, the injured would not give all the details which were given to the Investigating Officer just five minutes after the dying declaration was recorded by the Executive Magistrate. Nothing is shown as to why the police officer would record a false complaint against the accused when the dying declaration recorded by the Executive Magistrate in presence of the Medical Officer and the evidence of the accused's own daughter Manjuben and neighbour Aminaben fully corroborate the contents of the complaint Exh. 76, which itself has to be treated as a dying declaration before the police.

13. In light of the above evidence on record, non-examination of head constable Nathabhai who was the first one to inform the Investigating Officer about the commission of murder by the accused is of no consequence whatsoever. Since complaint Exh. 76 is also to be treated as a dying declaration as indicated above, nothing would have turned upon answer to the question as to who informed head constable Nathabhai about commission of crime by the accused.

14. In view of the above discussion, we find no merit in any of the contentions urged on behalf of the appellant-accused. Accordingly, the appeal is dismissed.

(M.S. Shah, J.)

(D.A. Mehta, J.)

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